

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

WASTE ACTION PROJECT,

Plaintiff,

v.

FIRST STUDENT, INC.; STRATA  
ENVIRONMENTAL SERVICES, INC.,

Defendants.

CASE NO. 3:23-cv-05084-DGE

ORDER GRANTING IN PART  
MOTION TO DISMISS (DKT. NO.  
9)

**I INTRODUCTION**

This matter comes before the Court on Defendant Strata Environmental Services, Inc.’s (“Strata”) motion to dismiss (Dkt. No. 9). For the reasons articulated herein, the Court GRANTS in part Strata’s motion.

**II BACKGROUND**

Plaintiff Waste Action Project brings suit against Strata and First Student, Inc. (“First Student”) for violations of effluent standards and limitations under the Clean Water Act

1 (“CWA”), including the requirements imposed by First Student’s National Pollutant Discharge  
2 Elimination System (“NPDES”) permit. (Dkt. No. 1.)

3 Waste Action Project is an environmental non-profit focused on environmental protection  
4 in Washington State, particularly water quality issues. (*Id.* at 3.) First Student owns a storage  
5 and transloading facility for marine and construction materials located at 1128 St. Paul Avenue,  
6 Tacoma, WA 98421 (“Facility #20229”). (*Id.* at 5.) The complaint contains no details regarding  
7 Strata.

8 The CWA forbids persons from discharging pollutants unless they otherwise comply with  
9 the CWA. *See* 33 U.S.C. § 1311(a). The EPA Administrator may authorize a person to  
10 discharge a pollutant into navigable waters if they receive a permit from the EPA. *See* 33 U.S.C.  
11 § 1342(a). The CWA also permits states to develop their own permitting systems to regulate  
12 discharges of pollutants into navigable waters, subject to approval by the EPA Administrator.  
13 *See* 33 U.S.C. § 1342(b). Washington State has a federally approved NPDES permit program.  
14 *See* Wash. Rev. Code § 90.48.260.

15 First Student received Industrial Stormwater General Permits (“ISGP”) from Washington  
16 State—first in December 2014 and then in December 2019 once the initial permit expired. (Dkt.  
17 No. 1 at 6.) The ISGP authorizes First Student to discharge stormwater into Thea Foss  
18 Waterway (and eventually into the Puget Sound). (*Id.*) The permits contain effluent limits and  
19 other requirements, including “monitoring requirements, corrective action requirements, and  
20 reporting and recordkeeping requirements.” (*Id.*) For example, First Student’s ISGP requires it  
21 to develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”). (*Id.* at 4.)  
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1 Waste Action Project alleges discharges from Facility #20229 have exceeded the effluent  
2 limitations imposed by the ISGP (*id.* at 7) and First Student has otherwise not complied with  
3 various measurement, planning, and recordkeeping obligations under its permit (*id.* at 8–14).

4 Waste Action Project sent its notice of intent to sue under the CWA to First Student and  
5 Strata on September 7, 2022 and October 7, 2022. (*Id.* at 2.) It also sent copies of the notice  
6 letter to the Administrator of the EPA, the Administrator of EPA Region 10, and the Director of  
7 the Washington Department of Ecology on September 13, 2022. (*Id.*)

8 Waste Action Project filed its complaint on February 1, 2023, asserting claims for  
9 violations of conditions in First Student’s NPDES permit and violations of Administrative Order  
10 14270. (*Id.* at 14–15.) Strata filed a motion to dismiss claims against it on March 22, 2023.  
11 (Dkt. No. 9.) Waste Action Project filed a timely response in opposition to the motion (Dkt. No.  
12 13) and Strata filed its reply on April 14, 2023 (Dkt. No. 15).

### 13 III DISCUSSION

#### 14 A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

15 Strata moves to dismiss Waste Action Project’s claims for lack of subject matter  
16 jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). (Dkt. No. 10 at 1.)

##### 17 1. Legal Standard

18 The CWA authorizes private persons and organizations to bring civil suits against “any  
19 person” that violates effluent standards or limitations. *See* 33 U.S.C. § 1365(a)(1). A party may  
20 not bring a citizen suit, however, without providing 60-days’ notice to “any alleged violator of  
21 the standard, limitation, or order.” 33 U.S.C. § 1365(b)(1)(A). The EPA has promulgated  
22 regulations which provide further guidance as to how a party may provide pre-suit notice:

23 Notice regarding an alleged violation of an effluent standard or limitation or of an  
24 order with respect thereto, shall include sufficient information to permit the

1 recipient to identify the specific standard, limitation, or order alleged to have been  
2 violated, the activity alleged to constitute a violation, the person or persons  
3 responsible for the alleged violation, the location of the alleged violation, the date  
or dates of such violation, and the full name, address, and telephone number of the  
person giving notice.

4 40 C.F.R. § 135.3(a).

5 The notice requirement is intended to:

6 strike a balance between encouraging citizen enforcement of environmental  
7 regulations and avoiding burdening the federal courts with excessive numbers of  
8 citizen suits. Requiring citizens to comply with the notice and delay requirements  
9 serves this congressional goal in two ways. First, notice allows Government  
10 agencies to take responsibility for enforcing environmental regulations, thus  
obviating the need for citizen suits. In many cases, an agency may be able to  
11 compel compliance through administrative action, thus eliminating the need for any  
access to the courts. Second, notice gives the alleged violator “an opportunity to  
bring itself into complete compliance with the Act and thus likewise render  
unnecessary a citizen suit.”

12 *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 29 (1989) (cleaned up).

13 Given this purpose, the Ninth Circuit has strictly construed the CWA’s notice  
14 requirement. *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000)  
15 (“[T]he CWA’s notice requirement is strictly construed and . . . compliance with the notice  
16 requirement is a prerequisite to a citizen enforcement action.”). Courts also treat the notice  
17 requirement as a jurisdictional issue—if a plaintiff fails to provide proper notice, the Court may  
18 not have jurisdiction to hear claims brought pursuant to that notice. *See, e.g., Ctr. For Biological*  
19 *Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 800 (9th Cir. 2009) (“[T]he giving of a 60–  
20 day notice is not simply a desideratum; it is a jurisdictional necessity.”).

21 Attacks on jurisdiction may either be facial or factual. *Leite v. Crane Co.*, 749 F.3d 1117,  
22 1121 (9th Cir. 2014). Facial attacks on jurisdiction assume the truth of the allegations in the  
23 complaint but nonetheless argue the court lacks jurisdiction to hear such claims. *Id.* The court,  
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1 in such a posture, must assume the well-pleaded allegations in the complaint are true and  
2 construe the complaint in favor of the non-moving party. *Id.*

3 Factual attacks, by contrast, “dispute[] the truth of the allegations that, by themselves,  
4 would otherwise invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035,  
5 1039 (9th Cir. 2004). “[A] factual attack under Rule 12(b)(1) allows district courts to look  
6 beyond ‘the face of the pleadings, [and] review any evidence, such as affidavits and testimony, to  
7 resolve factual disputes concerning the existence of jurisdiction.’” *Southard v. Ballard Marine*  
8 *Constr., Inc.*, 458 F. Supp. 3d 1298, 1303 (W.D. Wash. 2020) (quoting *McCarthy v. United*  
9 *States*, 850 F.2d 558, 560 (9th Cir. 1988)). The court may consider such evidence without  
10 converting the motion to a motion for summary judgment. *Harborview Fellowship v. Inslee*, 521  
11 F. Supp. 3d 1040, 1046 (W.D. Wash. 2021). The plaintiff ultimately bears the burden of proving  
12 by a preponderance of the evidence that the Court has jurisdiction. *Leite*, 749 F.3d at 1121.

13 *2. Consideration of additional documents outside the pleadings*

14 As an initial matter, the Court must decide what, if any, evidence outside of the pleadings  
15 to consider in deciding this motion. Both Waste Action Project and Strata have provided  
16 affidavits or other evidence outside of the pleadings to support their arguments. (*See* Dkt. Nos. 9  
17 at 5; 14.)

18 Strata states it is bringing both a facial and factual attack on this Court’s jurisdiction.  
19 (*See* Dkt. No. 10 at 7.) Though Strata appears to argue the Court should not consider Waste  
20 Action Project’s affidavits and evidence submitted in support of its response brief (*see* Dkt. No.  
21 15 at 3), in deciding a factual attack on jurisdiction the Court may consider affidavits and other  
22 evidence submitted by either party that touch on the Court’s jurisdiction, *see Southard*, 458 F.  
23 Supp. 3d at 1303. The Court, accordingly, may look beyond the pleadings to review evidence  
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1 going to the Court’s jurisdiction without converting Strata’s motion into a motion for summary  
2 judgment. *Id.*

3 *3. Adequacy of Notice*

4 The Court finds Waste Action Project has provided adequate notice to Strata as required  
5 by 33 U.S.C. § 1365(a)(1).

6 Strata argues Waste Action Project fails to state facts sufficient to establish it provided  
7 the requisite notice because the “pre-suit notice letter here was, on its face, directed only to First  
8 Student, Inc., and not to Strata Environmental.” (Dkt. No. 10 at 8.) According to Strata, a plain  
9 reading of the letter would “lead any potential reader of the letter at Strata Environmental to  
10 conclude that the letter was intended for First Student and was intended to address alleged  
11 violations of the Clean Water Act by First Student.” (*Id.*) Alternatively, Strata argues its  
12 relationship with First Student is contractual and it does not have sufficient ties to First Student  
13 for the notice letter to provide it with adequate notice as required by the CWA. (*Id.* at 10.)

14 Waste Action Project, in response, argues it only needed to provide sufficient notice such  
15 that the recipients of its notice letter could ascertain the nature of the violations at issue as well as  
16 who was responsible for them. (Dkt. No. 13 at 10.) The Notice of Intent to Sue was addressed  
17 to the managing agent of Facility #20229 and Waste Action Project believes Strata to be the  
18 managing agent for the facility. (*Id.* at 13.) Waste Action Project also cites to several cases in  
19 this District and Circuit for the principal that a party bringing a citizen suit is not responsible “for  
20 pars[ing] out liability between defendants in its notice letter, especially when alleging joint  
21 liability for all violations.” (*Id.* at 11.)

22 Waste Action Project’s notice of intent to sue under the CWA is directed to the following  
23 entities:

1 Managing Agent  
First Student, Inc. #20229  
2 1128 St. Paul Avenue  
Tacoma, WA 98421

3 Managing Agent  
4 First Student, Inc.  
600 Vine Street Suite 1400  
5 Cincinnati, OH 45202

6 Managing Agent  
First Student, Inc. #20229 C/O Strata Env  
7 110 Perimeter Park Rd Suite E  
Knoxville, TN 37922-2247

8 (Dkt. No. 14-1 at 2.) The notice letter sent to Strata references Strata only twice. Waste Action  
9 Project references Strata in the address line, where it directs the letter to “First Student, Inc.  
10 #20229 C/O Strata Env,” and in the text of the letter when it states “[t]his letter is to provide you  
11 with sixty days’ notice of WAP’s intent to file a citizen suit against First Student, Inc. #20229  
12 C/O Strata Env (‘First Student’) under section 505 of the Clean Water Act.” (*Id.*) The greeting  
13 line of the letter states “Dear Managing Agent.” (*Id.*)

14 It is clear to the Court that this notice letter was not addressed directly to Strata. Black’s  
15 Law Dictionary defines C/O as an abbreviation of “Care of.” *C/O.*, Black’s Law Dictionary  
16 (11th ed. 2019). As other courts have observed, use of such a designation indicates “that mail  
17 addressed to a person who does not reside at an address will not be delivered by the United  
18 States Postal Service unless the mail is addressed ‘in care of’ someone who does reside at that  
19 address. *Longo v. L. Offs. of Gerald E. Moore & Assocs., P.C.*, No. 04 CV 5759, 2008 WL  
20 4425444, at \*3 (N.D. Ill. Sept. 26, 2008). The use of “care of” does not indicate that the party  
21 receiving mail is the subject of the letter.

22 Waste Action Project has also not established that Strata was First Student’s managing  
23 agent. Waste Action Project does not assert in its complaint that Strata is First Student’s  
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1 managing agent. (*See generally* Dkt. No. 1.) Managing agent is defined as “[a] person with  
2 general power involving the exercise of judgment and discretion, as opposed to an ordinary agent  
3 who acts under the direction and control of the principal.” *AGENT*, Black’s Law Dictionary  
4 (11th ed. 2019). Nothing in the complaint indicates Strata had this authority.

5 Waste Action Project’s additional factual details also fail to prove such a claim. In his  
6 affidavit, Strata’s President, Kevin Parr, asserts Strata “is not the operator or managing agent of  
7 the facility identified as #20229 located at 1128 St. Paul Avenue, Tacoma, Washington 98421.”  
8 (Dkt. No. 9 at 5.) Waste Action Project responds to this argument by asserting Strata’s contact  
9 information is listed on First Student’s ISGP as a “Legal Responsible Party.” (*See* Dkt. No. 14-2  
10 at 2.) However, Strata has submitted an additional affidavit clarifying that the individual listed  
11 as the legally responsible party for the ISGP, Susan Kirkpatrick, is employed by First Student,  
12 not Strata. (Dkt. No. 16 at 1.) A subsequent EPA water compliance inspection report dated  
13 March 3, 2022, refers to Strata as “First Student’s consultant.” (Dkt. No. 14-9 at 3.) In short,  
14 Waste Action Project’s evidence provides only limited insight into Strata’s responsibilities at  
15 Facility #20229 other than its responsibility for the SWPPP. It is unclear whether Strata  
16 employees had general power to exercise their judgment and discretion regarding their  
17 contractual responsibilities or were considered the managing agent of the facility at issue.

18 Despite the notice letter’s facial deficiency, Strata still received adequate notice of Waste  
19 Action Project’s intent to sue. The Court agrees with the logic of Judge Richard Jones and that  
20 of other courts that the CWA’s notice requirement need only “give the Defendants a reasonable  
21 opportunity to identify which of them was the responsible owner or operator at the time of the  
22 violations.” *Puget Soundkeeper All. v. Louis Dreyfus Commodities LLC*, No. C14-803RAJ, 2016  
23 WL 7718644, at \*6 (W.D. Wash. Mar. 11, 2016); *see also Paolino v. JF Realty, LLC*, 710 F.3d  
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31, 40 (1st Cir. 2013) (finding pre-suit notice letter satisfactory because it “allow[ed] the defendants to determine each other’s responsibility for the individual violations.”).

In *Puget Soundkeeper*, Judge Jones concluded that “proper service of a notice of intent to sue on one member of a group of related corporate entities sharing the same address and registered agent [] serve[d] as proper service as to all of the alleged violators within that group.” 2016 WL 7718644 at \*4. The plaintiffs in the action sent their notice of intent to sue to only one company among a group of interrelated companies and subsequently added the other companies to their suit by amending their complaint. *Id.* Because the companies were interrelated and the notice included the relevant permit number and alleged violations, Judge Jones found the plaintiffs did not need to issue a notice to each of the new defendants in the case. *Id.* at \*6. Proper notice to one company among an interrelated group of companies “serve[d] the three chief purposes behind the CWA’s notice requirements: to alert the appropriate agencies to the alleged violations, to give ‘the alleged violator a chance to voluntarily comply with the CWA before facing administrative or judicial action,’ and to provide ‘both the regulatory entities and the alleged violators an opportunity to discuss a potential settlement with all of the interested plaintiffs.’” *Id.* (quoting *Friends of Frederick Seig Grove #94 v. Sonoma Cty. Water Agency*, 124 F. Supp. 2d 1161, 1167 n.7 (N.D. Cal. 2000)).

Strata tries to distinguish itself from the companies in *Puget Soundkeeper* by arguing it does not share common ownership with First Student, it is not related to First Student, and it does not own or operate Facility #20229. (Dkt. 9 at 5.) However, it is undisputed Strata was served with a notice letter identifying specific violations of First Student’s ISGP permit. (*See generally* Dkt. No. 14-1.) The notice letter details issues with First Student’s SWPPP, which

Strata managed. (Dkt. Nos. 1 at 21–22; 14-7 at 4; 14-9 at 3.)<sup>1</sup> Even though Waste Action Project’s notice letter was not directly addressed to Strata, Strata accepted service of the letter and the letter clearly indicated violations of specific permit conditions with which Strata was involved and for which it could face potential liability. The letter thus served the purpose of alerting regulatory entities and potential violators of environmental issues to alleged permit violations and provided them with the ability to bring Facility #20229 into compliance. See *Ctr. For Biological Diversity*, 566 F.3d at 800; see also *Long v. KZF Dev.*, 935 F. Supp. 2d 889, 893 (N.D. Ill. 2013) (finding CWA notice adequate where plaintiff sent notice letter to parent corporation instead of the subsidiary responsible for alleged violations).

Given Strata’s apparently regular involvement with regulatory authorities regarding Facility #20229, the Court finds Waste Action Project’s notice to Strata was sufficient under the CWA.

## **B. Motion to Dismiss for Failure to State a Claim**

### *1. Legal Standard*

Strata also moves to dismiss Waste Action Project’s complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 10 at 11.)

When deciding whether to grant a Rule 12(b)(6) motion, the Court must accept well pleaded factual allegations in the complaint as true and construe them in favor of the non-moving party. *Nw. Env’t Advocs. v. U.S. Dep’t of Com.*, 283 F. Supp. 3d 982, 990 (W.D. Wash. 2017). Factual allegations must be plausible, which means they must be pled with sufficient “factual

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<sup>1</sup> Strata also communicated with the Washington Department of Ecology regarding issues with First Student’s SWPPP on at least one occasion on May 14, 2021. (See, e.g., Dkt. No. 14-21 at 2.)

1 content [] [to] allow[] the court to draw the reasonable inference that the defendant is liable for  
2 the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Allowing a court to draw  
3 reasonable inferences from a pleading as to a defendant’s potential liability is different than the  
4 notice necessary to inform the appropriate agencies of the alleged violations under the CWA.  
5 *See* Section III.A.3., *supra* (identifying the three chief purposes behind the CWA’s notice  
6 requirements).

7 *2. Failure to State a Claim*

8 The Court finds Waste Action Project engaged in impermissible shotgun pleading and its  
9 complaint therefore fails to state a claim.<sup>2</sup>

10 Strata argues Waste Action Project’s complaint “contains virtually no allegations directed  
11 specifically to Strata Environmental.” (Dkt. No. 10 at 12.) Waste Action Project conflates First  
12 Student with Strata and “[c]onflating Strata Environmental with a separate Defendant without  
13 explanation is simply a legal conclusion disguised as a fact.” (*Id.*) Strata also argues Waste  
14 Action Project has not pled facts establishing Strata is the managing agent of Facility #20229 nor  
15 that Strata “has authority to exercise control over the activities of First Student that are alleged to  
16 be causing excess discharges.” (Dkt. No. 15 at 7.)

17 In response, Waste Action Project argues its pleading is sufficient because “the entire  
18 complaint clearly refers to both Strata and First Student, collectively, alleging a host of violations  
19 committed by Strata” and that all CWA violations in the complaint are alleged against both  
20 Strata and First Student. (Dkt. No. 13 at 13–14.)

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23 <sup>2</sup> The Court does not rely on or review the affidavits and evidence presented by the parties in  
24 deciding Strata’s Rule 12(b)(6) motion.

1 Waste Action Project's complaint is facially deficient as it does not allow the Court to  
2 draw the reasonable inference Strata is liable for the misconduct alleged. The complaint refers to  
3 Strata twice, once in the case caption and once in the opening sentence, when it asserts:

4 This action is a citizen suit brought under Section 505 of the Clean Water Act  
5 ("CWA") as amended, 33 U.S.C. § 1365. Plaintiff Waste Action Project seeks a  
6 declaratory judgment, injunctive relief, the imposition of civil penalties, and the  
7 award of costs, including attorneys' and expert witnesses' fees, for Defendants First  
Student, Inc.'s and Strata Environmental Services, Inc.'s (collectively "First  
Student") repeated and ongoing violations of effluent standards and limitations  
under the CWA.

8 (Dkt. No. 1 at 1.) The complaint does not otherwise discuss Strata.<sup>3</sup> This is impermissible  
9 shotgun pleading. *See, e.g., Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001)  
10 (affirming dismissal of complaint for shotgun pleading where complaint failed to make a  
11 distinction between various defendants even though it was plain from the facts "that all of the  
12 defendants could not have participated in every act complained of."); *see also Martin v.*  
13 *Washington State Dep't of Corr.*, No. C20-0311-JCC-MAT, 2021 WL 511205, at \*2 (W.D.  
14 Wash. Feb. 11, 2021) (dismissing § 1983 complaint that collectively referred to defendants and  
15 made no effort to distinguish which parties committed particular actions or were responsible for  
16 specific decisions); *United States v. Sharfi*, No. 21-CV-14205, 2021 WL 9958607, at \*4 (S.D.  
17 Fla. July 29, 2021) (dismissing claims against corporate officer in his individual capacity for  
18 failure to state a claim because the plaintiff did not plead facts specific to the defendant's  
19 individual capacity and permitting such claims to proceed would require speculation and  
20 assumptions about the scope of the defendant's duties); *Anderson v. JPMorgan Chase & Co.*,  
21 No. C18-73 RSM, 2018 WL 3608405, at \*2 (W.D. Wash. July 26, 2018) (dismissing complaint  
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23 <sup>3</sup> The complaint confusingly does not list Strata separately in its section on parties (*see id.* at 3–  
24 5), even though it should be obvious to Waste Action Project that Strata and First Student are at  
least facially distinct corporate entities.

1 in part because it “violates Rule 8 pleading standards by failing to distinguish between  
2 Defendants.”).

3 The Court therefore finds Waste Action Project has failed to plead facts sufficient for the  
4 Court to determine Strata is liable for the environmental violations alleged.

### 5 **C. Leave to Amend**

6 Though the Court finds Waste Action Project’s complaint has failed to state a claim  
7 against Strata, the Court also finds it should be permitted to amend its complaint.


8 Leave to amend should be freely given “when justice so requires.” Fed. R. Civ. P.  
9 15(a)(2). “Dismissal without leave to amend is improper unless it is clear . . . that the complaint  
10 could not be saved by any amendment.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir.  
11 2009) (quoting *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002)). The Court finds  
12 Waste Action Project may be able to resolve the deficiencies with its original complaint by more  
13 properly detailing allegations regarding Strata’s involvement in Facility #20229 and alleged  
14 violations of First Student’s NPDES permit. The Court therefore GRANTS Waste Action  
15 Project with leave to amend its complaint.

## 16 **IV CONCLUSION**

17 Accordingly, and having considered Strata’s motion (Dkt. No. 9), the briefing of the  
18 parties, and the remainder of the record, the Court finds and ORDERS that Strata’s motion is  
19 GRANTED in part.

- 20 1. Strata’s motion to dismiss for lack of subject matter jurisdiction is DENIED.
- 21 2. Strata’s motion to dismiss for failure to state a claim is GRANTED.
- 22 3. Waste Action Project is GRANTED leave to amend its complaint. Waste Action  
23 Project shall file an amended complaint no later than 21 days after the entry of  
24 this order.

1 Dated this 30th day of June, 2023.

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6 David G. Estudillo  
7 United States District Judge  
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